

**Pilot Freight Carriers, Inc. and Etta Belle Kirby.**  
Case 11-CA-9665

October 18, 1982

**DECISION AND ORDER**

**BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND HUNTER**

On June 11, 1982, Administrative Law Judge William A. Pope II issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

WILLIAM A. POPE II, Administrative Law Judge: On March 5, 1981, the Acting Regional Director for Region 11 of the National Labor Relations Board filed a complaint alleging that Respondent, Pilot Freight Carriers, Inc., engaged in unfair labor practices, within the meaning of Section 8(a)(1) of the National Labor Relations Act (the Act), by more stringently enforcing work rules and, on December 16, 1980, discharging its employee, Etta Belle Kirby (the Charging Party), because she had engaged in concerted activities with other employees for the purpose of collective bargaining and mutual aid and protection. The hearing was held on November 4, 1981, in Winston-Salem, North Carolina, before me.

**I. ISSUES**

The primary issue in this case is whether Etta B. Kirby was fired by Respondent, her employer, on or about December 17, 1980, because she had engaged in

protected concerted activities with other employees by protesting the selection by Respondent of a particular individual to fill a vacant job, in violation of Section 8(a)(1) of the Act.<sup>1</sup> A secondary issue raised by the General Counsel on brief, but not in the complaint, is whether Respondent violated Section 8(a)(1) of the Act by imposing on its employees a rule against talking.

The General Counsel argues that the actions of Etta Kirby and six or more of her coworkers in Respondent's data center in requesting meetings with various of Respondent's officers and officials for the purpose of complaining about the selection of the person to fill the open data control clerk job were concerted protected activities, and that the timing of her dismissal from her job was so closely related to the protected activities that it must be found that Etta Kirby was fired because of her involvement in those activities. Although Respondent elected not to file a post-hearing brief, it does not appear that Respondent disputes that the actions of Etta Kirby and her coworkers concerning the data control job were protected concerted activities. Instead, Respondent's position appears to be that Etta Kirby was fired because of excessive absences from her job, poor attitude and disruptive behavior, and insubordination, none of which was related to her participation in protected concerted activities. I agree, in part.

**II. BACKGROUND**

In October 1980, Etta Kirby, who had been employed as a keypunch operator (or data entry operator) in Respondent's data center for over 8 years, was one of a number of keypunch operators who applied for a vacant data center position as a data control clerk. The announcement on October 28, 1980, by Carroll Hedgecock, the data center manager, of his selection of Barbara Griggs, one of the least senior data center employees, to fill the data control clerk position angered many, if not all, of the other applicants. After discussing Hedgecock's choice among themselves, seven or more of the keypunch operators, including Etta Kirby, decided to complain to Respondent's management because they considered Barbara Griggs to be unqualified for the position and to lack seniority. Pursuant to the Company's "open door" policy concerning complaints,<sup>2</sup> Etta Kirby asked her immediate supervisor, Carroll Hedgecock, to arrange a meeting with top management. Hedgecock apparently told her that she and her coworkers would first have to meet with his supervisor, Thomas L. Norman, director of management systems. Within 1 to 2 weeks after Griggs' selection was announced, Norman and his supervisor, John McDermon, vice president of management

<sup>1</sup> Respondent stipulated that it has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

<sup>2</sup> The Company's personnel manual promises an "open door" policy available to employees to bring their complaints to management's attention, and further promises that there will be no discrimination against anyone for presenting a complaint or discussing problems with his supervisors or anyone in management. According to the manual, complaints are to be made first to the complainant's immediate supervisor, and then to succeeding levels of management until a satisfactory resolution is achieved.

systems, met with six of the keypunch operators, including Etta Kirby, who expressed their displeasure over the selection of Barbara Griggs to fill the data control clerk job. During the course of the meeting, McDermon made a remark to the effect that he had warned Hedgecock that the selection of Barbara Griggs would not be popular. Apparently not satisfied with the results of the meeting with Norman and McDermon, Etta Kirby, speaking for the other employees, again requested a meeting with top management.

Within a matter of a few days, seven employees, including Etta Kirby, met with Lawrence R. Toburen, president of Pilot Freight Carriers, Inc., and Ron Daves, then vice president of personnel. Emotions apparently ran high during the meeting, all of the employees were eager to speak, and, on one occasion, Etta Kirby interrupted Toburen, an action for which she quickly apologized. Toburen, for his part, testified that he considered Kirby to be disruptive, and, to bring the meeting to an orderly close, told her that, if she continued to interrupt, he would leave the room. Other witnesses testifying about the meeting felt that all of the employees were talking excitedly, that Etta Kirby was not any more disruptive than anyone else, and that Toburen's threat to leave was not addressed to her in particular. During the meeting, the employees repeated their complaint that Barbara Griggs was not qualified, by experience or seniority, and raised a new charge that she had been selected because she had fraternized with her supervisors, Carroll F. Hedgecock and Thomas L. Norman.<sup>3</sup> Toburen and Daves concluded the meeting by telling the employees that Griggs would stay on the payroll and retain the data control clerk job. After the meeting, Toburen told Hedgecock and Norman what had been said at the meeting with the employees and asked them if the fraternization charge was true. The charge was denied by both. At some point after Toburen and Daves met with the data center employees, they told McDermon to bring morale and production problems in the data center under control.

Beginning on December 16, 1980, each of the employees in the data center was asked to meet individually with McDermon, Norman, and Hedgecock for the purpose of discussing, among other things, attendance, lack of productivity, discontent, and alleged harassment of Barbara Griggs.<sup>4</sup> Etta Kirby was the eighth employee

interviewed on December 16. From the start, according to the testimony of everyone involved, the meeting with Kirby went badly. According to Kirby, Norman and Hedgecock had been harassing the employees who had met with Toburen, and, when she was called in at 4 p.m. on December 16 to meet with her supervisors, even though she had earlier that day placed a note on Hedgecock's desk requesting permission to leave early at 4:15 p.m., a request which Hedgecock denied seeing until the next day, she was accused of excessive absences, talking on the job, and harassing Barbara Griggs, charges which she denied. During the course of the meeting, she told Hedgecock he was discriminating against her, and she said "not guilty" or "no comment" in response to several questions. The meeting ended, according to Etta Kirby, when she was suspended by McDermon, after he asked her what she intended to do about her "absentee record," and she said:

... I told him that I had just talked to Carroll, and I said, "You heard it, and nothing I can say or do will change it." So I said, "I have nothing further to say."

Several days later, she received a letter from Respondent informing her that her employment had been terminated.<sup>5</sup>

John McDermon testified that, as the senior company official present, he was in charge of the individual meetings held with the data center employees on December 16, and that he encountered no problems with any of the employees until he met with Etta Kirby. When Kirby appeared for the meeting, however, she was uncooperative and hostile from the outset. Although a survey made by Hedgecock showed that Kirby had been absent 22.7 percent of the time during the preceding 6 months, she denied that she had an attendance problem, and challenged the validity of the survey. She responded with "not guilty" or "no comment" to various statements or questions concerning production problems, disparaging remarks by employees about management, and harassment of Barbara Griggs.<sup>6</sup> Finally, according to McDermon, he asked Kirby if she would devote herself to getting her job done and making the Company a better place to work. Her answer was, "No comment." McDermon repeated his question, and received the same answer. He then stated that he wanted an answer and repeated the question a third time. Etta Kirby's response was to the effect that she did not have to answer such questions at that time and place. McDermon then suspended her, and the meeting concluded. The following day, McDermon met with Toburen and Daves, Etta Kirby's file was reviewed, and Toburen and Daves concurred with McDermon's recommendation that Kirby's employment should be terminated.

<sup>3</sup> Hedgecock and Norman were permitted to enter denials to the charge during their testimony; however, the parties were not permitted to litigate the truth or falsity of the charge because the question of how Barbara Griggs was selected is irrelevant to the issues of this case. Respondent does not appear to deny that the employees who protested Griggs' selection were engaged in concerted protected activities, and there is nothing in the record raising the claim that Etta Kirby was fired because she had made untrue charges against her supervisors concerning their behavior towards Griggs. Respondent, in fact, appears to contend that Kirby's discharge was entirely unrelated to the Griggs incident.

<sup>4</sup> The meetings followed a request by keypunch operator Valjean Grant to Hedgecock for a meeting concerning seating arrangements. McDermon, Hedgecock, and Norman testified that the timing was coincidental, that they had been planning to hold the individual meetings for several days, and that the agenda had nothing to do with seating arrangements among the employees, although seating arrangements were discussed briefly with several employees.

<sup>5</sup> By letter dated December 18, 1980, Respondent informed Kirby that she was dismissed from her job because of excessive absenteeism, extremely poor attitude and disruptive behavior, and insubordination toward management.

<sup>6</sup> Although McDermon believed that Etta Kirby was involved in the harassment of Griggs, he testified that he did not necessarily believe she had organized it.

According to Respondent's manual, disciplinary actions involving nonunion employees usually involve four steps, beginning with oral counseling, followed by two instances of oral counseling and written documentation, and ending with discharge. The exceptions to the usual procedure involve serious infractions, including gross insubordination, when the four-step procedure can be waived and the employee immediately discharged.

Etta Kirby acknowledged having received a written warning concerning her attendance in December 1978.<sup>7</sup> Beyond that, Respondent offered in evidence several other documents recording reminders or warnings administered to Etta Kirby concerning her attendance or other aspects of her job performance. These documents, all prepared by Hedgecock and addressed to Kirby, included a memorandum, dated August 24, 1976, reminding her to notify her supervisor as soon as possible if she had to be absent from her job; a memorandum, dated January 12, 1979, warning her that her employment would not be continued unless her attendance improved; and a memorandum, dated April 20, 1979, stating that it was a final warning, and that "[a]ny further unexcused absences within sixty (60) days or failure to follow company policy or instruction in the future will result in immediate discharge." Although each of the memoranda was addressed to her, Etta Kirby denied having received any of them.

### III. FINDINGS AND CONCLUSIONS

#### A. Discharge of Etta Kirby

On the record before me, I find that Etta Kirby was fired by Respondent for insubordinate conduct on December 16, 1980,<sup>8</sup> which was unrelated to her participation in protected concerted activities, in the form of protests by a group of employees over the selection of their coworker, Barbara Griggs, to file a vacant job as a data control clerk.<sup>9</sup>

The General Counsel variously characterizes Etta Kirby's behavior during her meeting with her supervisors on December 16 as "frank and forthright, if a bit garrulous," "perfectly understandable," "perfectly rational, given the circumstances," and "not any more insubordinate than the behavior of . . . [other] employees" who were not fired, and argues that the reasons given by Respondent for terminating Etta Kirby's employment were

pretextual in nature, and designed to cover up the fact "the Respondent took the actions it believed necessary, as quickly as it could, to get the 'rotten apple' out of the barrel." Pointing out that the punishment imposed was disproportionate to the misconduct, the General Counsel argues that the timing of the termination of Etta Kirby's employment was so closely related to the protected activity that it must be found that she was fired because she had engaged in, and was thought to be leader of, concerted protected activities.

As a general matter, an employer is entitled to discuss such employment-related matters as attendance, morale, production, and attitude with its employees, and it is acting within the bounds of the employment relationship when it requests a commitment from its employees to try to improve attendance and working conditions. All of the witnesses presented by both the General Counsel and Respondent, including Etta Kirby, agree that these were generally the subject matter of the individual interviews which management conducted with 10 of the data center employees on December 16 and 17.

There is no doubt that Etta Kirby's conduct during the December 16 interview with management was hostile and argumentative. By her own admission, she accused her supervisor of inflating her absence record by counting days she was not scheduled to work,<sup>10</sup> limited her answers to a number of concerns raised by the management officials conducting the interview to cryptic remarks such as "no comment" or "not guilty," and refused to make any commitment to improve her attendance. Stripped of conclusory testimony and characterizations, there is in fact little material difference between the testimony of Kirby, on the one hand, and Respondent's management officials, on the other; however, on balance, after hearing all of the testimony and observing the demeanor of the witnesses, I conclude, and find, that the description of the interview contained in the testimony and notes of John McDermon, Respondent's vice president of management systems, is the most creditable and the most accurate. I further find that it is clear that from the outset and throughout the interview Kirby was haughty, uncooperative, and disrespectful.

According to Etta Kirby's testimony, however, she felt that she was being discriminated against, and that it would have been useless on her part to try to defend herself against the untrue and unfounded accusations with which she was confronted. Thus, it appears, she contends that she did not have any problems with her attendance, production, or attitude, and it was unnecessary for her to make any commitment to try to improve them.

The real question presented here is whether Kirby's conduct during the December 16 meeting was provoked by management officials and used as a pretext to terminate her employment because of her participation in protected concerted activities. If the interview on December 16 was but the last in a pattern of harassment directed at her, as argued by Kirby, then her insolence towards her

<sup>7</sup> The letter, which confirms a conversation between Etta Kirby, Hedgecock, and Norman on December 11, 1978, indicates that improvement was needed in her attendance, attitude towards her supervisors, attitude towards her fellow workers, and attitude towards her job.

<sup>8</sup> By letter from John N. McDermon, "VP/Management Systems, Pilot Freight Carriers, Inc.," dated December 18, 1980, Etta Kirby was informed that her employment had been terminated for excessive absenteeism, extremely poor attitude and disruptive behavior, and insubordination toward management. From the record, however, it is apparent that the actual reason she was fired was for insubordination. The history of absences and attitudinal problems alluded to in the letter did not precipitate the termination of her employment, but were factors considered by Respondent's management in deciding to fire Etta Kirby rather than impose a lesser punishment for her insubordinate conduct on December 16, 1980.

<sup>9</sup> It is not disputed that the group actions of seven or more employees in Respondent's data center requesting two meetings with management to protest Griggs' selection were protected concerted activities within the meaning of Sec. 7 of the Act.

<sup>10</sup> Hedgecock testified that the survey which he had prepared showing that Kirby had been absent from her job 22.7 percent of the time during the preceding 6 months covered only days when she was assigned to work.

supervisors on December 16 may be excusable. If not, and Kirby was not asked to make any more of a commitment toward improving her attendance and her dedication to her job than her coworkers, then Kirby's behavior was clearly insubordinate, and Respondent was within its rights to terminate her employment. Unfortunately for the Charging Party, I find the latter to be the case here.

The record does not support the conclusion that the reasons cited by Respondent for firing Etta Kirby were mere pretexts intended to hide the real reason, which was resentment towards Kirby because of her role in complaining about the selection of Barbara Griggs to fill the data control clerk job. Although the firing was reasonably proximate in time to the meetings between the data center employees and management concerning the Barbara Griggs' issue, it appears from the record that 3 to 4 weeks, or longer, actually elapsed between the last meeting with management concerning Griggs and the individual employee interviews conducted by management on December 16 and 17, which resulted in Kirby's being fired. Thus, while the firing and the concerted protected activities were sufficiently proximate in time to warrant closely examining the circumstances of both to determine if they were related, there was ample time for an independent intervening cause to arise, and, therefore, timing, alone, is insufficient to prove the tainted relationship alleged by the General Counsel.

Neither can any support be found in the record for the General Counsel's argument that Etta Kirby was singled out for harsh disciplinary action, as an example to others, because she was perceived to be one of the leaders of the protests over the selection of Barbara Griggs. It is indeed clear from the record that Kirby, in fact, was not a leader of the protest action, which was more in the nature of a spontaneous, but leaderless, coalescing of individual interests. Although Kirby made two requests for group meetings on behalf of her coworkers, she was not a spokesperson for the group. During each of the two group meetings, each participant spoke for herself; indeed, the problem during the meeting with the company president seems to have been too many people trying to speak at the same time. Moreover, not only was there no factual basis for a perception on the part of management that Kirby was a leader of the protest, but also neither McDermon nor Toburen, whose testimony on this point I find to be creditable, believed Kirby to be acting in a leadership capacity.<sup>11</sup>

Similarly, there was no perception on the part of management that Etta Kirby was leading any form of harassment of Barbara Griggs. Although never clearly defined, it appears that the so-called harassment amounted to nothing more than a refusal on the part of some of the employees in the data center to associate with Barbara Griggs. On this point, I credit the testimony of John McDermon, who stated that he thought that Kirby was involved in the harassment of Griggs, but did not necessarily believe that she was the organizer of it.

<sup>11</sup> I find that McDermon's testimony outweighs the effect of any "admissions" contained in the position letter of February 10, 1981, from counsel for Respondent.

I find no evidence that the company president, Lawrence R. Toburen, directed or suggested that Kirby's employment be terminated because of her conduct during the group meeting while he attended. Thus, if there was any intent on the part of Respondent's management to fire Kirby because of her participation in the protected concerted activities, it would have to have been by John McDermon, Thomas L. Norman, or Carroll F. Hedgecock, the three management officials who conducted the interview with Kirby on December 16.

It is at least arguable that Norman and Hedgecock might have had ulterior motives to fire Kirby, since they were both aware of the fraternization charges made against them by employees of the data center to the company president, although there is nothing in the record suggesting any basis for their suspecting that Kirby, in particular, was responsible for the charges. Or, it can be further argued, their goal may simply have been to intimidate the employees into silence by the example set by firing one of their number, and Kirby, because of her previous problems, was the most vulnerable.

The weakness of these arguments, however, is obvious because neither Hedgecock nor Norman made the decision to fire Kirby. That decision, which was approved by President Toburen and Vice President Daves, initially was made by John McDermon, himself a vice president of the Company. As reflected in the record, it was McDermon who was in charge of the December 16 interviews with the employees of the data center, it was his request for a commitment to improve attendance and performance which Kirby refused to answer, and it was his decision to suspend Kirby. The following day, after asking for the opinions of Norman and Hedgecock, McDermon made the recommendation to fire Kirby which President Toburen approved. Unlike Norman and Hedgecock, who knew Kirby and had supervised her for several years, McDermon was unfamiliar with her work record until after the insubordination incident. McDermon was not named in the fraternization charge raised by the data center employees during their meeting with President Toburen, and, accordingly, it would seem unlikely that he was motivated by a desire to seek revenge or retribution. On the evidence of record, therefore, I conclude that McDermon had no reason to single out Kirby for punishment because of her participation in concerted protected activities, or to make an example of her in order to intimidate and silence data center employees.

The commitment which McDermon asked of Kirby was reasonable under the circumstances<sup>12</sup> and no different from that requested of her coworkers. There is no evidence of a pattern of harassment of Kirby culminating in the December 16 interview, or that the purpose of the interviews conducted by management with the data center employees on December 16 and 17 was anything other than to improve morale, efficiency, and productivity among the employees. There is no evidence of any intent on the part of McDermon prior to the interview

<sup>12</sup> Kirby apparently had one of the poorer attendance records during the preceding 6 months among the data center employees, and her prior record indicates that she had been warned previously about attendance.

to discipline, suspend, or fire Kirby, and the decision by management to terminate Kirby's employment following the interview was neither disproportionate to the offense nor inconsistent with the Company's established personnel procedures. The December 16 and 17 interviews conducted by management with the data center employees were unrelated to the protected concerted activities in which some of the employees, including Kirby, had engaged in protesting the award of the data control clerk job to Barbara Griggs.<sup>13</sup> On the basis of this record, therefore, I find that there was no excuse for Kirby's behavior during her interview with management on December 16, and that her conduct was insubordinate under the circumstances. Respondent had good cause to terminate Kirby's employment, and its decision to do so was unrelated to any protected concerted activity in which she may have previously participated.

Accordingly, I find that the General Counsel has failed to show by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by terminating the employment of its employee, Etta B. Kirby, on or about December 17, 1980.

#### *B. The No Talking Rule*

Although not raised as an issue either in the complaint or during the hearing, the General Counsel argues in his brief that Respondent committed an unfair labor practice, in violation of Section 8(a)(1), by attempting "to put a muzzle on employee interaction which might lead to further protected activities," by the oral promulgation of "a rule against talking across the room by data processing employees."<sup>14</sup> Upon consideration of the record,

<sup>13</sup> Although alleged harassment of Barbara Griggs was one subject raised during the December 16 and 17 interviews, it was not the principal purpose of the interviews. In any event, harassment of Griggs, if it occurred, would not have been a protected concerted activity.

<sup>14</sup> No motion has been received to amend the complaint pursuant to Sec. 102.17 of the Board's Rules and Regulations; however, because I find that the allegation is without merit, there is nothing to be gained by

however, I find that there is no evidence to sustain a finding that Respondent violated Section 8(a)(1) by imposing any such rule.

The factual basis relied on by the General Counsel is testimony by Etta Kirby to the effect that, after the employees met with President Toburen, their supervisors, Tom Norman and Carroll Hedgecock, harassed them by telling them not to talk across the room. Kirby also testified, however, that such a rule was in existence before Norman's and Hedgecock's remarks following the meeting with President Toburen. The record is devoid of any other evidence which might serve to further explain the scope and application of the purported rule, or to differentiate the rule following Norman's and Hedgecock's remarks from the rule as it existed and was applied previously. In short, there is nothing in the record which would indicate that whatever rule Respondent maintains against talking is not properly limited to talking in the work area during working hours. In the absence of any evidence as to the scope of the rule and how it was applied, I find that the General Counsel has failed to show by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by imposing upon its employees a rule against talking.

Accordingly, I am issuing the following recommended Order:

#### **ORDER<sup>15</sup>**

It is hereby ordered that the complaint in this case be, and it hereby is, dismissed in its entirety.

deferring consideration of it, and I will dispose of it in this Decision as though it had been properly raised as an issue.

<sup>15</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.